

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In the Matter of)
)
 Inter-Carrier Compensation)
 for ISP-Bound Traffic)

RECEIVED
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 CC Docket No. 99-68
 FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

REPLY COMMENTS OF KMC TELECOM INC.

KMC Telecom Inc. ("KMC"), by its undersigned counsel, submits these reply comments in response to the comments submitted pursuant to the *NPRM* issued in the above captioned proceeding.¹ As discussed more fully below, and contrary to the claims made by several incumbent LECs ("ILECs"), there are no legal or policy reasons that require treating ISP-bound traffic any differently than traffic subject to reciprocal compensation.² The Commission should require that inter-carrier compensation for this traffic be the same as reciprocal compensation for local traffic generally. Accordingly, the Commission should adopt the tentative conclusion it articulated in the *NPRM* that on a going-forward basis inter-carrier compensation for this ISP-bound traffic should be subject to state supervision under the negotiation and arbitration processes of Sections 251 and 252.

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¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling and Notice of Proposed Rulemaking, CC Docket Nos. 96-98, 99-68, FCC 99-38, released February 26, 1999 ("*Dial-Up Order*" or "*NPRM*").

² See Comments of BellSouth Corporation ("BellSouth"); see Comments of SBC Communications Inc. ("SBC"); see Comments of U.S. West Communications, Inc. ("U.S. West").

I. THE CURRENT INTER-CARRIER COMPENSATION MECHANISM SHOULD REMAIN IN PLACE

KMC reiterates its view that the Commission should continue to treat ISP-bound traffic in the same manner as local traffic for purposes of determining inter-carrier compensation. Under the current inter-carrier compensation mechanism, the FCC has left the determination of inter-carrier compensation rates to the states. The states, in turn, have applied the same rate level and rate structure requirements to this traffic as to other local traffic and have treated it as subject to mandatory negotiation and arbitration under Sections 251 and 252 of the Act. As a result, current interconnection agreements were negotiated with the understanding that there is no distinction between ISP-bound traffic and local traffic for purposes of inter-carrier compensation.

II. ISP-BOUND TRAFFIC SHOULD BE TREATED THE SAME AS LOCAL TRAFFIC

At the time interconnection agreements were initially negotiated, competitive local exchange carriers ("CLECs"), including KMC, favored bill-and-keep as the method of determining inter-carrier compensation for local traffic. However, the ILECs, believing that they could win the bulk of the business terminating this traffic, pushed for and won the right to use reciprocal compensation mechanisms for local traffic. As a result, KMC and many other CLECs changed their business plans and made substantial investments in an effort to capture a portion of this market, including ISP-bound traffic.

The ILECs now hope to use this proceeding to regain in the regulatory process what they lost in the marketplace. In this proceeding, several ILECs argue no reciprocal compensation should be paid for the termination of ISP-bound calls despite the fact that there is a cost to the terminating

carrier.³ However, CLECs incur the same costs when receiving an ISP-bound call from an ILEC and then transporting, switching, and "handing off" this traffic to an ISP as when it performs the same functions and "terminates" a local call to an end user.

Furthermore, TELRIC rates are based upon the total level of output over a given network element and the cost studies underlying the current reciprocal compensation rates should have been based upon the average cost of all calls, including those to ISPs.⁴ Because the costs are the same, it would create market distortions if this traffic were compensated on a basis different from local traffic. For example, the FCC permits reciprocal compensation to be used for determining the inter-carrier compensation rates for CMRS.⁵ Yet in this service ILECs receive more compensation for terminating CMRS calls than they pay out.⁶ Permitting reciprocal compensation to apply to CMRS traffic but not to ISP-bound traffic would skew the totality of inter-carrier compensation mechanisms in favor of ILECs, allowing them to receive the majority of the compensation for termination of CMRS traffic, but not allowing CLECs to receive proper compensation for the traffic they deliver to their ISP customers. To avoid this, the FCC should establish a mechanism by which the inter-carrier compensation for ISP-bound traffic is the same as for local traffic generally.

³ Comments of U.S. West at 3; Comments of Bell South at 4; Comments of SBC at 4-5.

⁴ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499, 15850 (1996) ("*Local Competition Order*").

⁵ See *Id.* at 11 FCC Rcd 16041-42.

⁶ See *Id.* at 16053; see also *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, SBC Comments, at 11-12 (March 4, 1996) (approximately 80 percent of LEC-CMRS traffic would be terminated by ILECs).

III. THE FCC HAS THE LEGAL AUTHORITY TO REGULATE ISP-BOUND TRAFFIC

A. FCC May Permit States to Regulate ISP-Bound Traffic

Contrary to the assertions put forth by the ILECs, the FCC has the authority to permit states to regulate rates for inter-carrier compensation for ISP-bound traffic. The Eighth Circuit has specifically rejected the argument that the "ESP exemption" was not lawful because it permitted states to regulate rates for communications which had jurisdictionally interstate components.⁷ The Eighth Circuit found that because ISP-bound traffic is jurisdictionally mixed and could not reliably be separated into intrastate and interstate components, the FCC has the discretion to permit states to supervise interstate traffic rates where it does not conflict with stated federal goals.⁸

Furthermore, by permitting states to set rates for this traffic, the FCC would not be impermissibly delegating federal authority to the states. In fact, under the FCC's proposal there would be no delegation of federal authority. Rather, the Commission could simply determine that state supervision of this area would not conflict with any federal goal or rule. This is the approach the FCC took during the pendency of this rulemaking. Thus, under the FCC's proposal, states would not be compelled to regulate ISP-bound inter-carrier compensation. Instead, the states would be free to do so as long as they did not conflict with the goals established by the FCC. KMC submits that this would not constitute a delegation of authority to the states under current federal law.

Nor would it constitute a delegation of federal power for the FCC to establish boundaries of preemptive federal authority within which state regulations could not stray. KMC asserts that states

⁷ *Southwestern Bell v. FCC*, 153 F.3d 523, 542-43 (8th Cir. 1998)

⁸ *Id.*

may set inter-carrier compensation for ISP-bound traffic based on TELRIC without running afoul of federal goals. This is because, as discussed above, it would not constitute a delegation of authority for a state to voluntarily choose to regulate in this area and to follow FCC pricing rules. Nor would there be a delegation if the FCC were to preempt a state that obstructed the advancement of express federal objectives in this area. Indeed, such an action would be an assertion of paramount federal authority under the Supremacy Clause rather than a delegation of that authority. Accordingly, the Commission can permit states to regulate in this area, as a voluntary matter pursuant to federal guidelines without this constituting an impermissible delegation of authority.

Therefore, while KMC continues to assert that ISP-bound traffic is subject to Section 251(b)(5),⁹ even if the FCC were to assume that ISP-bound traffic is not subject to Section 251(b)(5), this would not prevent states from establishing inter-carrier compensation mechanisms in conformity with those contained within Sections 251 and 252. The 1996 Act created a new regulatory scheme in which the FCC has authority over some aspects of intrastate communications, which prior to the 1996 Act, were left to the states. The 1996 Act likewise permits the states to exercise some authority over communications traditionally reserved to the FCC. States are not precluded from regulating interstate communications under Sections 251 and 252, even if the given communication is not subject to Section 251(b)(5). Moreover, it is axiomatic that, absent any conflict with federal authority, states may exercise their inherent authority to regulate entities operating in their states. Thus, states may regulate inter-carrier compensation for ISP-bound traffic, even if it is interstate, so

⁹ KMC has sought to intervene in the appeal before the D.C. Circuit challenging the FCC's determination that ISP-bound Traffic is not within the scope of Section 251(b)(5). *Bell Atlantic Telephone Companies, US WEST, Inc., MCI WorldCom, Inc., GTE Service Corp. v. FCC*, Case Nos. 99-1094, 99-1095, 99-1097, 99-1106.

long as doing so does not conflict with federal objectives. States, likewise, may require carriers to negotiate and may impose mandatory arbitration for ISP-bound traffic. KMC sees no reason why the FCC may not state that the states may choose to require that inter-carrier compensation for this traffic be treated consistent with Section 251(b)(5).

B. FCC Authority Under Section 201

KMC also submits that the FCC's authority over incumbent LECs ("ILECs") pursuant to Section 201 provides additional authority for it to permit states to require ILECs to negotiate and arbitrate inter-carrier compensation for ISP-bound calls. Section 201 provides the FCC with general authority to make rules governing matters relating to interstate communications.¹⁰ Therefore, the Commission could resolve the present issue by requiring, as its regulation of interstate communications in this area, that ILECs subject themselves to state authority, including participation in state-supervised negotiation and arbitration. Similarly, the Commission could adopt a federal rule governing inter-carrier compensation for ISP-bound traffic that requires that inter-carrier compensation for this traffic be the same as for local traffic that either the parties have negotiated or that states have arbitrated under Section 252. This would eliminate concerns that states are exercising authority over interstate communications because states would only be exercising authority over intrastate communications. It would be the Commission's exercise of its authority over interstate communications that would govern inter-carrier compensation for ISP-bound traffic although the federal rate would be the same as the state rate.

¹⁰ See *Iowa Utilities Board*, 119 S.Ct. at 730.

Accordingly, KMC submits that there are no legal impediments to the Commission permitting states to regulate in this area. To the extent necessary, the FCC can achieve the same result as a practical matter by requiring ILECs to subject themselves to state authority or merely by determining that the federal rate for inter-carrier compensation for ISP-bound traffic shall be the same as state rates for reciprocal compensation generally.

IV. CONCLUSION

The FCC should permit carriers to reach agreement on inter-carrier compensation for ISP-bound traffic through negotiation. In the event that the parties fail to agree on such compensation, state commissions should arbitrate the disputed issues. The Commission should establish federal guidelines for these state commission arbitrations, and the guidelines should be substantively the same as the guidelines for reciprocal compensation for local traffic. KMC respectfully requests the Commission to adopt the recommendations set forth in these Comments.

Respectfully submitted,



Richard M. Rindler
James N. Moskowitz
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007
(202) 424-7500

Counsel for KMC Telecom Inc.

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CERTIFICATE OF SERVICE

I, Ivonne J. Diaz, hereby certify that on this 27th day of April 1999, copies of the foregoing Reply Comments of KMC Telecom Inc. were delivered by hand and first class mail to the following:

Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C.

Diskette To:
Wanda Harris
Common Carrier Bureau, Competitive Pricing Div.
Federal Communications Commission
445 Twelfth Street, S.W. - Fifth Floor
Washington, D.C. 20554

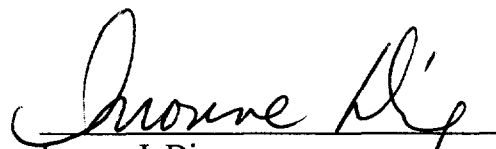
International Transcription Services, Inc.
1231 20th Street, N.W.
Washington, D.C. 20036

Jane Jackson
Chief, Competitive Pricing Division
Federal Communications Commission
The Portals
445 12th Street - Fifth Floor
Washington, DC

Richard Lerner
Deputy Chief, Competitive Pricing Division
Federal Communications Commission
1919 M Street, N.W. - Room 518
Washington, DC

Tamara Preiss
Competitive Pricing Division
Federal Communications Commission
The Portals
445 12th Street - Fifth Floor
Washington, DC

Ed Krachmer
Competitive Pricing Division
Federal Communications Commission
1919 M Street, N.W. - Room 518
Washington, DC


Ivonne J. Diaz